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Supreme Court, U.S.
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No. 95-624

In The

Supreme Court of the United States

October Term, 1995

SOUTHERN GUARANTY INSURANCE COMPANY OF GEORGIA,

Petitioner,

v.

SOUTHEASTERN EXPRESS SYSTEMS, GEORGE BARNES, KEVIN CLARK, and GERRY WAMBOLT,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, First Appellate District

REPLY BRIEF

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I.

INTRODUCTION

Much of Southeastern Express' Opposition is devoted to defending the California Court of Appeal's opinion in relation to the decisional law upon which that court relied in achieving reversal of the result below. The focus of Southern Guaranty's Petition, however, is that manner in which the Court of Appeal overstepped the boundaries of personal jurisdiction as established by this Court, and as properly applied by other jurisdictions in this context.

II.

THE CALIFORNIA COURT OF APPEAL'S DECISION IS IN CONFLICT WITH THE DECISIONS OF THIS COURT

Southeastern Express' discussion of the California Court of Appeal's presumption of economic benefit to Southern Guaranty fails to refute the inconsistencies between the Court of Appeal's opinion, and the decisions of this Court.

For example, Southeastern Express does not challenge Southern Guaranty's contention that the "benefits of an economic market" enjoyed by the nonresident corporation in *Quill Corporation v. North Dakota By and Through Heitkamp*, 504 U.S. 298, at 307 (1992) – namely, profits obtained through systematic solicitation of forum residents – were lacking here.[1]

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[1] As noted in Southern Guaranty's petition, *Quill*, 504 U.S. 298 was the specific authority cited in support of the Court of Appeal's formulation of its presumed economic benefit test. (Petition, pp. 12-13.)

Insofar as Southeastern Express undertakes to distance this case from *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), that effort falls short.

In *World-Wide Volkswagen*, this Court deemed the fact that the foreign manufacturer may have obtained marginal revenue from use of its products in the forum state "too attenuated" an economic contact to support jurisdiction. (*World-Wide Volkswagen*, 444 U.S. 286, at 299.) No more significant economic tie to California is present here. The Court of Appeal reached the opposite result based upon the mere presumption that the insurer earned premiums allocable to California as a result of its issuance of a nationwide policy potentially affording its insured a defense within the forum. (App. A6.) In this instance, then, the economic benefit attributable to the forum was less than "marginal" – it was unsubstantiated. While the Fourth and District of Columbia circuits have sanctioned this presumed benefits approach,[2] Southern Guaranty submits that it conflicts with the views expressed in *World-Wide Volkswagen, supra*.

Southeastern Express claims Southern Guaranty's "promise to defend its insured here" (Opposition, at p. 9) takes this case outside *World-Wide Volkswagen*. Not so. That promise is contingent upon the existence of a covered claim, which has not been established. This conditional promise to respond to a claim contained in an insurance contract is no different than the mere likelihood that an automobile manufacturer's product may be

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[2] See, *Rossman v. State Farm Mutual Automobile Insurance Co.*, 832 F.2d 282, 287 (4th Cir. 1987); *Eli Lilly and Co. v. Home Insurance Co.*, 794 F.2d 710, 721 (D.C. Cir. 1986).

used in a foreign jurisdiction. Neither connotes purposeful availment of the benefits of conducting business activity within the forum. (*World-Wide Volkswagen*, 444 U.S. 286, 297.)

Southeastern Express is also incorrect in its assertion that a nonresident insurer's knowledge of its insured's forum-based business activities is irrelevant to a court's examination of jurisdiction. (Opposition, pp. 10-13.)[3] Such knowledge is elemental to the constitutional inquiry at hand: whether the *defendant* purposefully directed its conduct toward the particular forum state. (*World-Wide Volkswagen*, 444 U.S. 286, 297-298.) The Court of Appeal concluded that Southern Guaranty had assumed obligations with respect to Southeastern Express' "significant activities" in California. (App. A13-A14.) Where the record failed to establish Southern Guaranty's awareness of Southeastern Express' interstate business activities, that knowledge could not be inferred, then used as evidence of Southern Guaranty's *purposeful* activity directed toward the forum.

Contrary to Southeastern Express' assertion, Southern Guaranty also made out a compelling case that California's exercise of jurisdiction would violate established

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[3] Southeastern Express claims Southern Guaranty argues that " . . . the law required its insureds to notify Southern Guaranty of their activities outside of Georgia if they wish those activities to be *covered*." (Opposition, at p. 12, citing Petition, p. 17 [Emphasis added].) This characterization misrepresents Southern Guaranty's stated argument. Southern Guaranty takes no position on the effect of an insured's lack of notice of its interstate activities on the provision of *coverage*. (See, Petition, p. 17.)

considerations of "fair play and substantial justice." (*International Shoe Co. v. Washington*, 326 U.S. 310, at 316 (1945), quoting *Milliken v. Meyer*, 311 U.S. 457, at 463 (1940).) As demonstrated, the California Court of Appeal's decision disregarded or misapplied those considerations.

Southeastern Express avoids direct examination of California's indisputable lack of interest in adjudicating disputes between nonresidents by professing that this case involves "issues of significant impact on California residents and the California economy." (Opposition, at p. 23.) The issues of insurance coverage and bad faith presented by this action, however, arise solely as between Georgia residents. This Court has held, and Southeastern Express does not contest, that California's legitimate interest in adjudicating controversies between nonresidents is "considerably diminished." (*Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, at 114 (1987).) Southeastern Express' efforts to elevate this action to one implicating "significant economic activity with impacts on California residents" (Opposition, at p. 23) cannot reasonably be entertained.

Southeastern Express is also wrong in arguing that Southern Guaranty would incur no significant burden in being compelled to defend against this action in California. Although this Court has observed that the advent of "modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity," (*McGee v. International Life Insurance Co.*, 355 U.S. 220, at 223 (1957)), it is undisputed that Southern Guaranty conducts

no business and maintains no physical presence in California. The insurance policy at issue was negotiated and delivered in Georgia. Hence, those witnesses relevant to this bad faith litigation are located primarily in Georgia – not California, as Southeastern Express maintains. (JA 83-101; JA 275.)[4] The burden that would be imposed upon Southern Guaranty were it required to defend against this contractual claim in California would be substantial.

Finally, Southeastern Express does not deny, nor can it, that the shared interests of California and Georgia fail to support California's exercise of jurisdiction over this litigation stemming from issuance of a Georgia insurance policy. For those reasons set forth in Southern Guaranty's petition, no frustration of the shared interests of these alternative forums would ensue from California's denial of jurisdiction. (Petition, at pp. 22-23.)

III.

THE COURT OF APPEAL'S DECISION IS INCONSISTENT WITH DECISIONS OF THE FEDERAL COURTS OF APPEAL AND OTHER STATE COURTS

Southeastern Express' effort to dispel the conflict between the Court of Appeal's decision and *Hunt v. Erie Insurance Group*, 728 F.2d 1244 (9th Cir. 1984) fails to

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[4] Southeastern Express has consistently argued that the officers and personnel of Triad Systems are witnesses essential to adjudication of this dispute. Given the narrow issues of insurance coverage and bad faith presented by this action – and the posture of the underlying case – their potential value to this litigation is questionable, at best.

consider the incongruous positions taken regarding the effect of an agreement to defend on the issue of personal jurisdiction. Whereas the California court held that a nationwide coverage clause and disputed defense obligation thereunder rendered Southern Guaranty amenable to suit in California, (App. A) in *Hunt, supra,* an agreement to defend in the forum, and refusal to pay policy benefits, were insufficient to constitute purposeful availment of the benefits of the forum state. (728 F.2d 1244, 1247-1248.)

The cases cited by Southeastern Express as supporting an absence of conflict amongst the federal courts of appeal are themselves distinguishable. *Rossman v. State Farm Mutual Automobile Insurance Co.,* 832 F.2d 282 (4th Cir. 1987) involved a declaratory judgment action instituted against a foreign automobile insurer by a resident of the forum state. Similarly, in *Farmers Insurance Exchange v. Portage La Prairie Mutual Insurance Co.,* 907 F.2d 911 (9th Cir. 1990), the plaintiff insurer sought reimbursement from a Canadian automobile insurer in connection with that insurer's refusal to defend a resident of the forum. The court's determination that the Canadian insurer could anticipate the likelihood of automobile use and ensuing litigation in Montana rested upon that insurer's status "as an automobile liability insurer." (907 F.2d 911, at 914.) *Payne v. Motorists' Mutual Insurance Companies,* 4 F.3d 452 (6th Cir. 1993) likewise involved a declaratory judgment action brought by an injured motorist against a foreign automobile insurer.

Of those state cases cited by Southeastern Express as being consistent with the California Court of Appeal's

exercise of jurisdiction over Southern Guaranty[5], most involved litigants who, unlike Southeastern Express, were residents of the forum state.[6] In other cases, jurisdiction rested on additional factors such as the presence of a narrow territorial limitation provision in the policy,[7] or policy renewals directed to the forum state.[8] Further, Southeastern Express' citation of *United Farm Bureau Mutual Insurance v. U.S. Fidelity & Guaranty Co.*, 501 Pa. 646, 462 A.2d 1300, 1301 (1983) actually supports Southern Guaranty's position that personal jurisdiction predicated upon a nationwide coverage clause is inappropriate.

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[5] See, authorities cited in Opposition, p. 18, note 20.

[6] *Szalay v. Handcock*, 307 Ark. 232, 819 S.W.2d 684 (1991) [action by resident insured]; *Bevins v. Comet Casualty Co.*, 71 Ill.App.3d 758, 390 N.E.2d 500 (1979) [action involving West Virginia judgment obtained by resident claimant]; *Jarstad v. National Farmers Union Property & Casualty Co.*, 92 Nev. 380, 552 P.2d 49 (Nev. 1976); [action by resident insured]; *New Jersey Automobile Full Insurance Underwriting Assn. v. Independent Fire Insurance Co.*, 253 N.J. Super. 75, 600 A.2d 1243 (1991) [direct action by resident claimant]; *Labruzzo v. State Wide Insurance Co.*, 353 N.Y.S.2d 98 (1974); [direct action by resident claimant]; *Parker v. Fireman's Insurance Co. of Newark*, 297 S.C. 166, 375 S.E.2d 325 (1988) [direct action by resident claimant]; *Guardian Royal Exchange Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223 (Tex. 1991) [action by resident insured].

[7] *Payne v. Mutual Fire & Automobile Insurance Co.*, 381 N.W.2d 523 (Minn. 1986).

[8] *Bahn v. Chicago Motor Insurance Club*, 98 Md.App. 559, 634 A.2d 63 (1993).

CONCLUSION

The California Court of Appeal's exercise of jurisdiction over a nonresident insurer possessing no cognizable contacts with the forum state is an affront to due process. An exercise of personal jurisdiction based upon a contingent contractual provision in an insurance policy between nonresidents runs contrary to the decisional law of this Court, and of a number of those jurisdictions that have considered the issue.

Certiorari should be granted in this instance to address and settle this important constitutional issue.

Respectfully submitted,

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